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# CONSTITUTIONAL MALFUNCTION: DOES THE FCC'S AUTHORITY TO REVOKE A BROADCASTER'S LICENSE VIOLATE THE FIRST AMENDMENT?

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## INTRODUCTION

On February 1, 2004, a “wardrobe malfunction” during the Super Bowl half-time show exposed Janet Jackson’s nearly bare breast to millions of Americans. At that moment, a new era in broadcast began. The next day the Federal Communications Commission (“FCC” or “Commission”) responded by ordering an immediate investigation into the “classless, crass, and deplorable stunt.”<sup>1</sup> In the eyes of the Commission, the event only highlighted the “race to the bottom” by “Big Media.”<sup>2</sup> In the days following the Super Bowl, the FCC

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<sup>1</sup> Press Release, Federal Communications Commission, FCC Chairman Powell Calls Super Bowl Halftime Show a “Classless, Crass, Deplorable Stunt.” Opens Investigation, *at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243435A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243435A1.doc) (Feb. 2, 2004).

I am outraged at what I saw during the halftime show of the Super Bowl. Like millions of Americans, my family and I gathered around the television for a celebration. Instead, that celebration was tainted by a classless, crass and deplorable stunt. Our nation’s children, parents and citizens deserve better. I have instructed the Commission to open an immediate investigation into last night’s broadcast. Our investigation will be thorough and swift.

*Id.*

<sup>2</sup> Press Release, Federal Communications Commission, FCC Commissioner Copps Deplores Outrageous Super Bowl Stunt, *at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-23447A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-23447A1.doc) (Feb. 2, 2004) (“I urge the Commission to address these com-

received over 200,000 complaints.<sup>3</sup> The latest effort to end “indecent” broadcasts, which had been building for some time, finally found its cause.

The FCC has the statutory authority to fine licensees and to revoke broadcast licenses for any indecent utterance in a broadcast.<sup>4</sup> The FCC has defined indecent material as material depicting sexual or excretory functions in a patently offensive way as measured by contemporary community standards for broadcast.<sup>5</sup> Although the FCC has never fully exercised its statutory enforcement powers, it has repeatedly warned broadcasters of its willingness to revoke a broadcaster’s license for indecent broadcasts.<sup>6</sup> In the post-Janet world, indecency has become an important issue in the past election year and beyond, and the FCC seems more willing than ever to revoke a license as opposed to simply issuing a fine.<sup>7</sup> Despite the timing of a license revocation, which appears to be a subsequent punishment, it nevertheless operates as a prior restraint. This paper examines the constitutionality of the license revocation power available to the FCC to prevent indecent broadcasts.

This paper is divided into four parts. Part I of this paper discusses both the history and the current state of broadcast indecency regulation by the FCC. This section includes a discussion of the federal statutes establishing the ban on indecency and the FCC’s powers, the FCC indecency guidelines, the Supreme Court’s decision in *FCC v. Pacifica*,<sup>8</sup> and the D.C. Circuit Court of Appeals decisions in the *Action for Children’s Television v. FCC*<sup>9</sup> cases. Part II of this paper discusses the prior restraint doctrine that the Supreme Court has de-

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plaints promptly. But one thing is clear – nothing this Commission has done so far has accomplished anything to slow down Big Media’s race to the bottom.”).

<sup>3</sup> Press Release, Federal Communications Commission, FCC Acknowledges Hundreds of Thousands Who Have Complained About the Super Bowl Halftime Show, at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-24368A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-24368A1.doc) (Feb. 6, 2004).

<sup>4</sup> 47 U.S.C. §312(a)(6) (2004); 18 U.S.C. §1464 (2005).

<sup>5</sup> *In re* Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*, 16 FCC Rcd. 7999, 8002 (2001) [hereinafter *Indecency Policy Statement*].

<sup>6</sup> See, e.g., *In re* Clear Channel Broadcasting Licenses, Inc., *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd. 1768, 1816 (2004) (Copps, M., dissenting) (“[T]he majority proposes a mere \$27,500 fine for each incident. Such a cost of doing business fine is never going to stop the media’s slide to the bottom. For repeat offenders as in this case, I believe the Commission should have designated these cases for license revocation hearings.”); see also, *Id.* at 1819 (statement of Jonathan S. Adelstein, Comm’r, Federal Communications Comm’n) (“Once again, we impose statutory maximum fines and remind broadcasters that the Commission can and will avail itself of a range of enforcement sanctions, including acting on each separate indecent utterance, or initiating proceedings that could result in the revocation of station licenses for serious, repeated violations.”).

<sup>7</sup> See *id.*

<sup>8</sup> 438 U.S. 726 (1978).

<sup>9</sup> 58 F.3d 654 (D.C. Cir. 1994), *cert. denied*, 516 U.S. 1043 (1996).

veloped over the last century, highlighting the specific rationales that make prior restraints particularly offensive to the First Amendment. Part III analyzes license revocation as a prior restraint. The analysis includes a discussion of the continued viability of the justifications for indecency regulation and includes a discussion of the chilling effects that are unique to license revocation, as opposed to fines and forfeitures. Part IV discusses the Commission's enforcement alternatives to license revocation, including the current proposals before Congress,<sup>10</sup> which would not violate the First Amendment rights of broadcasters.

## I. INDECENCY REGULATION BY THE FCC

The FCC's power to regulate indecency is derived explicitly from Congress pursuant to the Federal Communications Act of 1934 ("Communications Act" or "1934 Act").<sup>11</sup> There are two statutes that grant the majority of the FCC's authority to proscribe indecency - 47 U.S.C. §312 and 18 U.S.C. §1464.<sup>12</sup> Pursuant to the authority granted by the 1934 Act, the FCC has promulgated guidelines interpreting the indecency standard.<sup>13</sup>

### A. The FCC's Statutory Authority to Regulate Indecency

The FCC's authority to proscribe indecent speech has been upheld, though there are some limitations on its power.<sup>14</sup> In *Sable Communications of California v. FCC*,<sup>15</sup> the Supreme Court invalidated a statute that enacted a total ban on indecent and obscene telephone messages.<sup>16</sup> The Court did recognize that the FCC could regulate indecent messages, but it could only do so when the statute was narrowly tailored to serve the compelling purpose of preventing minors from having access to indecent messages.<sup>17</sup> The statute in question,

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<sup>10</sup> See Broadcast Decency Enforcement Act of 2004, H.R. 3717, 108th Cong. (2004); Broadcast Decency Enforcement Act of 2004, S.2056, 108th Cong. (2004).

<sup>11</sup> 47 U.S.C. §151 (1996) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio ... there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereafter provided, and which shall execute and enforce the provisions of this chapter.").

<sup>12</sup> *Indecency Policy Statement*, *supra* note 5, at 7999.

<sup>13</sup> *Id.*

<sup>14</sup> *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (explaining that in the context of telephony, the FCC may regulate indecency, but regulations must be by the least restrictive means necessary to promote a compelling state interest).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 131.

<sup>17</sup> *Id.*

however, was a total ban, and as such, was not narrowly tailored for such a purpose.<sup>18</sup>

Congress enacted the Communications Act pursuant to its authority under the Commerce Clause of the United States Constitution.<sup>19</sup> The Communications Act gives the FCC exclusive jurisdiction to regulate all radio transmissions.<sup>20</sup> Pursuant to this Act, the FCC is charged with enforcing violations of 18 U.S.C. §1464, which prohibits the broadcasting of “obscene, indecent, and profane” material.<sup>21</sup> This provision imposes both a fine and a maximum prison sentence of two years for anyone who violates the statute. Although §1464 is a criminal statute, the Commission has authority to impose civil penalties for the broadcast of indecent material without regard to the criminal nature of the provision.<sup>22</sup>

The FCC enforces the decency standard through civil penalties, administrative sanctions, and its reprimand authority. It may also impose a civil forfeiture for each violation of §1464.<sup>23</sup> The Commission also enjoys the power to sanction through administrative procedures, such as “revoke[ing] any station license or construction permit . . . (6) for violation of section 1304, 1343, or 1464 of Title 18.”<sup>24</sup> Before revoking a station’s license, the FCC is required to serve upon the licensee an order to show cause containing a statement including the indecent utterance.<sup>25</sup> The licensee may then appear before the Commission to give evidence on the matter.<sup>26</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> U.S. CONST. art. I, §8, cl. 3 (“Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

<sup>20</sup> Under the Act, the FCC operates as an independent regulatory commission composed of seven commissioners, each appointed by the President and confirmed by the Senate. In 1982, Congress voted to reduce the number of commissioners from seven to five. *See* 47 U.S.C. §§154-155 (1996). The President designates one of these commissioners as Chairman of the FCC. *See* 47 U.S.C. §154 (1996). The Commission, through these commissioners, has the power to make rules and regulations within the broad framework of the Commerce Clause. These regulations carry the force of law.

<sup>21</sup> *See* 47 U.S.C. §151(1996); *see also* 18 U.S.C. §1464 (2000) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

<sup>22</sup> *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 739 (1978); *see also* 47 U.S.C. §§312(a)(6), (b)(2), and 503(b)(1)(D) (2000). The Department of Justice is responsible for prosecution of criminal violations of the statute.

<sup>23</sup> 47 U.S.C. §503(b) (1) (D); (2) (A) (2000) (maximum forfeiture penalty of \$25,000 for each violation but not in excess of \$250,000 for any continuing violation).

<sup>24</sup> *Id.* §312(a) (6).

<sup>25</sup> *Id.* §312 (c) (“Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring . . . .”); *see also* *Id.* §312(d) (stating the burden of proof rests on the FCC).

<sup>26</sup> *Id.* §312(d).

## B. The FCC's Policy Interpreting Broadcast Indecency

In April of 2001, the FCC responded to broadcasters' long-standing requests by promulgating guidelines for interpreting indecency. The purpose was to aid broadcasters in determining what they could and could not air.<sup>27</sup> In it, the Commission defined indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms "patently offensive as measured by contemporary community standards for the broadcast medium."<sup>28</sup>

The FCC's definition of indecency requires two initial determinations. The first requirement is that the allegedly indecent material must fall within the scope of the Commission's indecency definition. In other words, "the material must describe or depict sexual or excretory organs or activities."<sup>29</sup> If the material does in fact describe or depict sexual or excretory functions, the FCC must find that the broadcast was "patently offensive as measured by contemporary community standards for the broadcast medium."<sup>30</sup> When applying that standard, the Commission determines "whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."<sup>31</sup>

"In determining whether material is patently offensive," the FCC looks at the context of the entire broadcast, weighing many different factors that "exacerbate or mitigate the patent offensiveness of particular material."<sup>32</sup> The FCC has announced three principal factors that are used in these decisions: (1) "the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;" (2) "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;" and (3) "whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value."<sup>33</sup> No single factor provides the basis for a finding of indecency.

The "explicitness or graphic nature" element is important because the more explicit or graphic the description, "the greater the likelihood that the material

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<sup>27</sup> *Indecency Policy Statement*, *supra* note 5, at paras. 1, 13-23.

<sup>28</sup> *Id.* at paras. 7, 8.

<sup>29</sup> *Id.* at para.7 (citing to *In re WPNB/WTOM License Subsidiary, Inc.*, *Memorandum Opinion and Order*, 15 FCC Rcd. 1838, para. 9 (2000)).

<sup>30</sup> *Id.* at para. 8.

<sup>31</sup> *Id.*

<sup>32</sup> *Indecency Policy Statement*, *supra* note 5, at para. 9.

<sup>33</sup> *Id.* at paras. 9,10.

will be considered patently offensive.”<sup>34</sup> Broadcasters cannot escape this factor by merely using innuendo or double entendre.<sup>35</sup> Material may still be indecent “if the sexual or excretory import is unmistakable.”<sup>36</sup> Additionally, broadcasters cannot escape a finding of indecency under this factor by obscuring objectionable material such that it is difficult to hear or understand what is being said.<sup>37</sup>

If there is a “repetition of and persistent focus on sexual or excretory material,” there is a greater likelihood that the material will be found indecent.<sup>38</sup> Even a fleeting reference to either a sexual or excretory function may be found indecent if other factors contribute to the offensiveness.<sup>39</sup> The factors cited by the FCC include references to sexual activities with children and airing material that, though fleeting, is exceptionally explicit or graphic.<sup>40</sup>

Finally, the FCC inquires into the purpose for which the material was aired. Material that has either a “pandering or titillating character,” is more likely to be found indecent, as are broadcasts presented merely for “shock value of the language.”<sup>41</sup> In determining whether the material has a pandering or titillating character, the context of the broadcast is critical; broadcasts that use explicit language, graphic material, or repetition of vulgar terms may not be indecent due to the context in which it is used.<sup>42</sup>

If the material meets the preceding criteria, the FCC then measures the broadcast against the “contemporary community standards for the broadcast medium.”<sup>43</sup> The standard is that of an average broadcast listener, and with respect to Commission decisions, does not encompass any particular geographic

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<sup>34</sup> *Id.* at para. 12.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at para. 12; *see, e.g.*, Letter from Roy J. Stewart, Chief, MM, to Michael J. Faherty, Exec. V.P., Cox Broad. Div., 6 FCC Rcd. 3704 (1994) (“notwithstanding the use of candy bar names to symbolize sexual activities, the titillating and pandering nature of the song makes any thought of candy bars peripheral at best.”).

<sup>37</sup> *Indecency Policy Statement*, *supra* note 5, at para. 16; *see, e.g.*, Letter from the FCC to KGB, Inc. (KGB-FM), 7 FCC Rcd. 3207 (1992) (stating that a song was indecent despite English accent and “ambient noise” because the lyrics were sufficiently understandable).

<sup>38</sup> *Indecency Policy Statement*, *supra* note 5, at para. 17.

<sup>39</sup> *Id.* at para. 19.

<sup>40</sup> *Id.*; *see, e.g.*, Letter from Roy J. Stewart, Chief, MM, to Tempe Radio, Inc. (KUPD-FM), 12 FCC Rcd. 21828 (1997) (finding reference to sexual activity with a child); *see also* Letter from Roy J. Stewart, Chief, MM, to LBJS Broad. Co., L.P., (KLBJ-FM), 13 FCC Rcd. 20956 (1998) (discovering a fleeting reference so explicit as to be indecent).

<sup>41</sup> *Indecency Policy Statement*, *supra* note 5, at para. 20.

<sup>42</sup> *See, e.g.*, King Broad. Co. (KING-TV), 5 FCC Rcd. 2971, para. 3 (1990) (asserting that the broadcast of a high school sex education class was not indecent despite realistic sex organ models, simulated demonstrations of methods of birth control, and frank discussions of sexual topics because “the material presented was clinical or instructional in nature”).

<sup>43</sup> *See Indecency Policy Statement*, *supra* note 5, at para. 8.

area.<sup>44</sup> This aspect of the indecency determination may be most problematic because it puts the determination of what an average broadcast listener finds decent solely within the discretion of five unelected politicians.

The definition of indecency is closely related to the definition of obscenity, though the two words have different meanings.<sup>45</sup> In order for material to be considered obscene, it must be found that “the average person, applying contemporary community standards” would find that the material “appeals to the prurient interest,” and that the material “taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>46</sup>

In applying the indecency standard, the FCC must look at the “contemporary community standards for the broadcast medium.”<sup>47</sup> The inquiry is quite different from that used in an obscenity case, because localized tastes are not considered. Because the “community standards” employed by the Commission are those for broadcast at large, communities with a higher tolerance for sexual/excretory discussion are left without such material. Because of this difference in “community standards,” material that is indecent to broadcast and material that is obscene to print can either overlap or be entirely divergent.

The two definitions also differ in that indecent material may still possess “serious literary, artistic, political, or scientific value.”<sup>48</sup> As the Commission’s guidelines make clear, the line between indecent and decent depends on context, and at times, something with value, such as social commentary, may be indecent due to context. The other difference between indecency and obscenity is that “prurient appeal” is an essential element of obscenity, whereas indecent “merely refers to nonconformance with accepted standards of morality.”<sup>49</sup> Additionally, the concern for children’s well-being is not the only justification for removing obscene material from the sphere of First Amendment protection; obscene material is banned because it is viewed as speech without benefit for anyone - adult or child.

### C. *FCC v. Pacifica Foundation*

The decision in *FCC v. Pacifica Foundation* marks the Supreme Court’s only opportunity to determine the constitutional boundaries of the FCC’s inde-

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<sup>44</sup> *Id.*

<sup>45</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 740-41 (1978).

<sup>46</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>47</sup> *Indecency Policy Statement*, *supra* note 5, at para. 8.

<sup>48</sup> *Pacifica*, 438 U.S. at 743, 768 n.2 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)) (“While some of these references may be protected, they surely lie at the periphery of First Amendment concern.”).

<sup>49</sup> *Id.* at 740.

cency enforcement powers. The case dealt with the now famous twelve minute "Filthy Words" monologue by "satiric humorist" George Carlin.<sup>50</sup> The topic of the monologue, which had been recorded from a live performance in a California theater, was Carlin's thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever."<sup>51</sup> He listed those words, and "repeat[ed] them over and over again in a variety of colloquialisms."<sup>52</sup> The recording was aired by a New York radio station owned by Pacifica Foundation at about two o'clock in the afternoon on a Tuesday as part of a social commentary.<sup>53</sup>

A man, claiming to have heard the broadcast while driving with his young son, wrote a complaint to the FCC.<sup>54</sup> In response, Pacifica stated that the monologue was part of a radio program discussing "contemporary society's attitude toward language," and that a disclaimer stated that "sensitive language which might be regarded as offensive to some" was to follow.<sup>55</sup> In its argument before the Commission, Pacifica emphasized the social value of the speech to its adult listeners in order to avoid falling under the obscenity rubric outlined in *Miller*.<sup>56</sup>

The FCC used its authority to proscribe indecency, pursuant to §1464, in issuing its order. The Commission found the broadcast to be a patently offensive description of sexual and excretory activities repeated over and over, broadcast at a time when children were in the audience, and that it was aired deliberately.<sup>57</sup> The FCC did not impose any administrative sanctions, though it found that it could have if it so desired.<sup>58</sup> Instead, the Commission put the order in Pacifica's file in the event that subsequent complaints were received, at which point the prior complaint would be reconsidered.<sup>59</sup>

The Court of Appeals for the D.C. Circuit reversed the FCC's decision.<sup>60</sup>

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<sup>50</sup> *Id.* at 729. By referring to Carlin as a satiric humorist, the Court began its decision by implicitly recognizing the social value of Carlin's words. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 729-30.

<sup>54</sup> *Pacifica*, 438 U.S. at 730 (Stating, " 'although he could perhaps understand the 'records being sold for private use, I certainly [cannot understand the broadcast of same over the air that']" the FCC controlled).

<sup>55</sup> *Id.*

<sup>56</sup> "*Pacifica* characterized George Carlin as 'a significant social satirist' who 'like Twain and Sahl before him, examines the language of ordinary people . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes toward those words.'" *Id.*

<sup>57</sup> *Id.* at 732.

<sup>58</sup> *Pacifica*, 438 U.S. at 730.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 733.



Judge Tamm stated that the Commission's order was prohibited by §326 of the Communications Act,<sup>61</sup> while Chief Judge Bazelon concluded that § 1464 covered only obscene language.<sup>62</sup> The Supreme Court took the case to determine whether the order was censorship prohibited under §326, whether the broadcast was indecent under §1464, and whether the order violated the First Amendment.<sup>63</sup>

On the first issue, the Supreme Court sided with the FCC, concluding "that §326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting."<sup>64</sup> The Court noted the history of interpretation under the 1934 Act, and its predecessor, Section 29 of the Radio Act of 1927.<sup>65</sup> The Acts had always been interpreted as giving the Commission "power to review the content of completed broadcasts in the performance of its regulatory duties."<sup>66</sup> Additionally, the prohibition on censorship could not apply to indecency determinations because both the censorship and indecency statutes had a common origin in the same provision of the 1927 Act, and as a matter of statutory interpretation, the two must be read harmoniously.<sup>67</sup>

The Court then addressed whether the "Filthy Words" broadcast was in fact indecent under §1464, being careful to narrowly confine the case to only those words broadcast by *Pacifica*.<sup>68</sup> *Pacifica* argued that although it fell under the Commission's definition of indecency, the broadcast should not be found indecent because it lacked prurient appeal.<sup>69</sup> The Court stated that the words

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<sup>61</sup> "Nothing in this Act shall be understood or construed to give the 'Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.'" 47 U.S.C. §326 (2000).

<sup>62</sup> *Pacifica*, 438 U.S. at 733-34.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 738.

<sup>65</sup> *Id.* at 735-36.

Section 29 of the Radio Act of 1927 provided: nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

*Id.* (quoting Radio Act of 1927, §29, 44 Stat. 1162 (1927) (current version at 47 U.S.C. §81, ch. 4 (2000))).

<sup>66</sup> *Pacifica*, 438 U.S. at 735.

<sup>67</sup> *Id.* at 737-38.

<sup>68</sup> *Id.* at 739 ("[T]hat question is narrowly confined by the arguments of the parties.").

<sup>69</sup> *Id.* at 739-40.

“[o]bscene, indecent, or profane [were] written in the disjunctive, implying that each has a separate meaning.”<sup>70</sup> “Prurient appeal is an element of the obscene, but the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.”<sup>71</sup> The Court also rejected *Pacifica*’s argument that §1464 be construed the same as §1461, a statute in which a list of similar words was held to refer only to “obscene” words.<sup>72</sup> The statutes could not mean the same thing because it was “unrealistic to assume” that Congress would impose the same limitations on distributing patently offensive material by broadcast as it did by the mail.<sup>73</sup>

The Court then turned to the justifications for regulating indecency on the radio, stating “that each medium of expression presents special First Amendment problems.”<sup>74</sup> The broadcast medium has always received less protection than newspapers because of its unique nature.<sup>75</sup> The reasons for treating broadcast differently than print are twofold: (1) the broadcast is “uniquely pervasive in the lives of Americans;”<sup>76</sup> and (2) the broadcast is “uniquely accessible to children.”<sup>77</sup> As discussed later, this rationale does not apply to television, because advances in cable and filtering technology have since mitigated these concerns.

Broadcasting is pervasive because the speech confronts the citizen not only in public, but also in the privacy of his own home.<sup>78</sup> Due to the fact that the individual’s privacy outweighs the speaker’s rights, the content may be regulated.<sup>79</sup> Outside the home, the balance tips back toward the rights of the speaker.<sup>80</sup> Additionally, broadcast messages are even more accessible to children, because even kids too young to read indecency in print can understand indecent broadcasts.<sup>81</sup> In order to protect the well-being of children, indecency may be regulated.<sup>82</sup> Therefore, the Court chose to allow regulation of indecent

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<sup>70</sup> *Id.* at 739-40.

<sup>71</sup> *Id.* at 739-40.

<sup>72</sup> *Pacifica*, 438 U.S. at 740-41 (referring to *Hamling v. United States*, 418 U.S. 87 (1974) prohibiting the mailing of “obscene, lewd, lascivious, indecent, filthy, or vile” material) (citing 47 U.S.C. §1461 (2000)).

<sup>73</sup> *Id.* at 741.

<sup>74</sup> *Id.* at 748 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952)).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 749.

<sup>78</sup> *See Pacifica*, 438 U.S. at 748-49.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 749 n.27 (noting that “outside the sanctuary of the home” First Amendment rights allow for even objectionable speech to be stated within the public dialogue).

<sup>81</sup> *See id.* at 749.

<sup>82</sup> *See discussion infra* Part III.B.

material but emphasized the narrowness of its holding.<sup>83</sup> It did not attempt to answer what speech, other than Carlin's oft-repeated words, would be indecent.<sup>84</sup> The Court ended by stating that a nuisance rationale, in which context is important, justifies indecency regulation. As explored later, this standard is exceedingly difficult to apply because of the ever-changing face of technology.

*D. Action for Children's Television v. FCC ("ACT III")*

In *ACT III* the Court of Appeals for the D.C. Circuit discussed whether the "safe harbor," which permits airing of indecency within a statutorily defined time, was constitutional.<sup>85</sup> Section 16(a) of the Public Telecommunications Act of 1992 set the safe harbor between 12 a.m. and 6 a.m., and between 10 p.m. and 6 a.m. for stations that "go off the air at or before midnight."<sup>86</sup> The group, Action for Children's Television ("ACT"), brought a constitutional challenge.

The court began by identifying the compelling governmental interests that justified a safe harbor. Though the FCC had proffered three interests,<sup>87</sup> the court upheld the safe harbor on only the first two: "support for parental supervision of children," and "a concern for children's well-being."<sup>88</sup> The court stated that, beyond a parent's concern for a child's well-being, the government has its own interest in the well-being of children that provides an independent justification for regulating indecency.<sup>89</sup> The government's interest in protecting children "extends beyond shielding them from physical and psychological harm," and includes protection from exposure to "materials that would 'im-pair[] [their] *ethical and moral* development.'"<sup>90</sup> The court assumed a causal nexus between indecency and harm, requiring no proof of any such connection.<sup>91</sup>

After identifying the compelling governmental interests, the court addressed whether the safe harbor was the least restrictive means necessary to achieve the

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<sup>83</sup> See *Pacifica*, 438 U.S. at 750-51 (citing examples of reiteration by later opinions).

<sup>84</sup> See *id.* at 750.

<sup>85</sup> See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1994), *cert. denied*, 516 U.S. 1043 (1996) [hereinafter *Act III*].

<sup>86</sup> *Id.* at 656.

<sup>87</sup> See *id.* at 660-61 (noting that the 3rd interest identified by the FCC, protection of the home against intrusion, was not addressed by the court).

<sup>88</sup> *Id.*

<sup>89</sup> See *id.* at 661 (stating that a democratic society relies on the well-rounded development of children into mature adult citizens).

<sup>90</sup> *Act III*, 58 F.3d at 662 (quoting *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)).

<sup>91</sup> *Id.* at 661-62.

goals.<sup>92</sup> Because of the extensive data that the FCC obtained regarding the number of children in the audience before midnight, the court upheld the safe harbor as the least restrictive means necessary to achieve the goal of shielding children from indecent broadcasts.<sup>93</sup> The court did hold that the safe harbor should be expanded to include the hours of 10 p.m. to 6 a.m. due to the unconstitutionality of the “public broadcaster exception.”<sup>94</sup> Because there was no evidence that children are less likely to be exposed to indecent material on a public broadcast station before midnight than on a commercial station, the court held that there was no reason to distinguish between the two types of broadcasters for the purposes of the safe harbor.<sup>95</sup>

*E. Action for Children’s Television v. FCC (“ACT IV”)*

*ACT IV* represents the most recent judicial decision regarding the FCC’s enforcement scheme.<sup>96</sup> The ACT coalition brought suit challenging the FCC’s forfeiture scheme. Specifically, the group alleged that the scheme lacked prompt judicial review and that it forced broadcasters to self-censor their material, a form of prior restraint, while the complaints worked through the slow-moving FCC enforcement system.<sup>97</sup>

The court upheld the statute on its face as being capable of constitutional application.<sup>98</sup> The court had a more difficult time addressing the as-applied challenge, because nothing in the FCC’s forfeiture scheme resembled a literal prior restraint.<sup>99</sup> The court explained how the forfeiture scheme did not impose unconstitutional self-censoring by broadcasters.<sup>100</sup> The court stated that the FCC had neither enforced its indecency ban against material that was not indecent, nor had the agency actively discouraged judicial review of indecency forfeiture penalties.<sup>101</sup> The court explained that any change in the system by Congress would merely change the timing of a district court’s review of an FCC forfeiture action.<sup>102</sup> Delays in the forfeiture scheme are only of constitutional

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<sup>92</sup> *See id.* at 663-67.

<sup>93</sup> *See id.* at 665-67.

<sup>94</sup> *Id.* at 667-69.

<sup>95</sup> *Act III*, 58 F.3d at 667-69.

<sup>96</sup> *Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) [hereinafter *Act IV*].

<sup>97</sup> *Id.* at 1252-53, 1255, 1260.

<sup>98</sup> *Id.* at 1259-60.

<sup>99</sup> *Id.* at 1260.

<sup>100</sup> *Id.* at 1260-62.

<sup>101</sup> *Act IV*, 59 F.3d at 1261.

<sup>102</sup> *Id.*

significance if they burden speech that is not indecent.<sup>103</sup> The majority opinion pointed out that no such showing had been made.<sup>104</sup>

In upholding the Commission's forfeiture scheme as constitutional, the court did leave the door open to future litigation. The majority stated that the broadcasters' claim "might be more compelling if in a particular case the Commission increased the fine for a subsequent violation . . .," or if the FCC denied a license renewal where the broadcaster had not acquiesced in the indecency determination, nor had its day in court.<sup>105</sup> Such a case may mean that non-indecent material was not broadcast before judicial review of the FCC determination.<sup>106</sup>

## II. DOCTRINE OF PRIOR RESTRAINT

The doctrine of prior restraint on speech is well rooted in the common law tradition.<sup>107</sup> The prohibition against prior restraint has "come increasingly to be viewed as a good thing, even as the notion of what constitutes a prior restraint has grown progressively more elastic and unstable."<sup>108</sup> This section recounts the history of the doctrine in the United States, starting with the Supreme Court's decision in *Near v. Minnesota*.<sup>109</sup> The section also outlines the major categories of prior restraint, discussing the rationale for prohibiting each category.<sup>110</sup>

### A. *Near v. Minnesota*: Injunctions as Prior Restraints

The Supreme Court first encountered prior restraints in *Near*.<sup>111</sup> The statute at issue authorized judicial abatement of any newspaper deemed "malicious,

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<sup>103</sup> *Id.*

<sup>104</sup> Contrast this assertion with the dissent by Judge Tatel, stating that "it is not clear to me how anyone could show that non-indecent speech is unaffected by the forfeiture scheme, because an impartial, independent Article III court has never evaluated any of the Commission's indecency decisions." *Id.* at 1266-67 (Tatel, J. dissenting).

<sup>105</sup> *Id.* at 1262.

<sup>106</sup> *Act IV*, 59 F.3d at 1262.

<sup>107</sup> Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650-52 (1955) (discussing the history of the prior restraint doctrine) [hereinafter Emerson].

<sup>108</sup> John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 414 (1983) [hereinafter Jeffries].

<sup>109</sup> 283 U.S. 697 (1931).

<sup>110</sup> See Emerson, *supra* note 107, at 655-56 (proposing the four categories of prior restraints).

<sup>111</sup> *Near*, 283 U.S. at 697.

scandalous and defamatory.”<sup>112</sup> There was a statutory defense for material that was both true and published “with good motives and for justifiable ends.”<sup>113</sup> A Minneapolis newspaper that exposed alleged wrongdoings of Jewish gangsters and city officials was subjected to the statute.<sup>114</sup> The newspaper made charges of graft, neglect, and incompetence against the mayor, the chief of police, a special law enforcement official, and the county attorney.<sup>115</sup> A state court judge found the newspaper to be “malicious, scandalous and defamatory” and issued an injunction against any further publication of such material.<sup>116</sup> The newspaper challenged the statute as facially invalid.<sup>117</sup>

The Court struck down the law as a prior restraint on speech. The Court reasoned that the purpose of the First Amendment is “to prevent previous restraints upon publication,” and this statute violated that purpose.<sup>118</sup> The Court pointed out, however, that the bar against prior restraints is neither absolute, nor is the permissibility of subsequent punishments absolute.<sup>119</sup> The distinction that the Court made between prior restraints and subsequent punishments dictated the outcome of the case:

In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court’s order, but for suppression and injunction - that is, for restraint upon publication.<sup>120</sup>

As the Supreme Court’s first significant discussion of prior restraint, *Near* assumes that categorizing the statute as a prior restraint is doctrinally necessary to its invalidation because without that label there would be no settled basis for holding the statute unconstitutional.<sup>121</sup> One commentator has suggested that the Court needed to find a way to invalidate the statute, otherwise it “could become a successful prototype for official suppression of hostile comment -- at

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<sup>112</sup> *Id.* at 701.

<sup>113</sup> *Id.* at 702.

<sup>114</sup> *Id.* at 703.

<sup>115</sup> *Id.* at 703-704.

<sup>116</sup> *Id.* at 706.

<sup>117</sup> *Near*, 283 U.S. at 708.

<sup>118</sup> *Id.* at 713.

<sup>119</sup> *Id.* at 716 (“[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications.”) (citation omitted).

<sup>120</sup> *Id.* at 715.

<sup>121</sup> Jeffries, *supra* note 108, at 416.

least of criticism sufficiently intemperate to be called ‘malicious, scandalous and defamatory.’”<sup>122</sup> The statute did not resemble a typical prior restraint: the decision to suppress was made by a judge, after adversarial proceedings, to determine the legal character of what had been published.<sup>123</sup> The only prior restraint was that the defendants were not allowed to repeat what they were proved to have done.<sup>124</sup> Ultimately, *Near* stands for the proposition that an injunction against speech is unconstitutional, even where the speech enjoined is not otherwise protected because the injunction prohibits further publication of similar material.<sup>125</sup>

The prior restraint rule has been extended to include many other injunctions against speech.<sup>126</sup> The use of injunctions in these cases “triggered” the prior restraint, but it is not clear how subsequent punishment could validly have suppressed the speech.<sup>127</sup> “In either event, it seems clear that the mechanism of suppression in the use of injunctions bears little resemblance to that involved in the permit cases.”<sup>128</sup>

#### B. Licensing and Permit Schemes as Prior Restraints

Official licensing, or administrative pre-clearance, is the most firmly established prior restraint. In such licensing/permit cases, the enforcement mechanism is criminal prosecution and punishment.<sup>129</sup> The prior restraint occurs be-

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 417.

<sup>126</sup> *See, e.g.*, *NY Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the government cannot enjoin publication of “Pentagon Papers”); *Oklahoma Publ’g Co. v. Dist. Court*, 430 U.S. 308 (1977) (setting aside pretrial order enjoining publication of name of 11 year old charged with delinquency by murder); and *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (invalidating order against publication of confessions or other highly incriminating information until impaneling of jury in murder case).

<sup>127</sup> Jeffries, *supra* note 108, at 418.

<sup>128</sup> *Id.*

<sup>129</sup> *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (holding unconstitutional statute prohibiting unlicensed commercial screening of motion pictures and authorizing denial of license for any sacrilegious film); *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating permit requirement for public worship on city streets); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (overturning disorderly conduct conviction for holding religious meeting without permission of park commission); *Saia v. New York*, 334 U.S. 558 (1948) (striking down ordinance against use of sound amplification equipment not approved by police chief); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (voiding licensing requirement for religious solicitation); and *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down municipal ordinance forbidding distribution of “literature of any kind” without prior permission of city manager).

cause the right to speech is conditioned upon advance approval from a government official.<sup>130</sup> The legality of speech depends on whether permission had been obtained, not on whether the speech was valid under the First Amendment.<sup>131</sup> Under these schemes, an executive official is empowered to determine whether the speech should be permitted or suppressed.<sup>132</sup> Not all permit schemes are constitutionally infirm,<sup>133</sup> but any permit scheme that inquires into the content of the speech runs afoul of the First Amendment because it operates as a restriction on the viewpoint of the speaker.

### C. The “Other” Prior Restraints Against Speech

Finally, there is a category of prior restraints that involves neither permits nor injunctions. These cases are not like the other two categories of restraint, and they are not like one another.

In *Thornhill v. Alabama*,<sup>134</sup> the Court overturned a criminal conviction for labor picketing in violation of a state statute. Subsequent punishment combined with an overly vague statute is, in the same manner as administrative licensing, an unconstitutional restraint on speech.<sup>136</sup> The Court, citing an essay from John Milton, discussed the power of the licensor.<sup>137</sup> The licensor was restraining speech not merely by censure but by threat to censure.<sup>138</sup> It was not just the sporadic abuse of power but the pervasive threat inherent in its very existence that constituted the danger to freedom of expression.<sup>139</sup> The Court found a similar threat in a criminal statute that swept within its ambit other activities that in ordinary circumstances constituted an exercise of free speech.<sup>140</sup> “The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive re-

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<sup>130</sup> *Jeffries*, *supra* note 100, at 417.

<sup>131</sup> *Id.* at 417-18.

<sup>132</sup> *See, e.g., Joseph Burstyn*, 343 U.S. 495; *Kunz*, 340 U.S. 290; *Niemotko*, 340 U.S. 268; *Saia*, 334 U.S. 558; *Cantwell*, 310 U.S. 296; and *Lovell*, 303 U.S. 444.

<sup>133</sup> Permits that regulate time, place, or manner are not unconstitutional.

<sup>134</sup> 310 U.S. 88 (1940); *see also* William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 262 (1982) (discussing *Thornhill* in relation to the history of censorship in Britain) [hereinafter Mayton].

<sup>136</sup> Mayton, *supra* note 131, at 262-63.

<sup>137</sup> *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*



straint on all freedom of discussion that might reasonably be regarded as within its purview.”<sup>141</sup>

In *Grosjean v. American Press Co.*,<sup>142</sup> the Court was faced with a state statute that imposed a tax, in addition to normal state taxes, on newspaper sales. The Court found the statute unconstitutional as an abridgement of the First Amendment.<sup>144</sup> After reciting a long history of taxes on speech in Britain, the Court applied the same rationale used in *Near*.<sup>145</sup> The newspaper tax statute was determined to be a prior restraint with the effect of burdening speech.<sup>146</sup> Recognizing that the case did not resemble either the classic administrative preclearance or an injunction as in *Near*, the Court focused more on the chilling effects on speech as a result of the tax. Quoting Judge Cooley, the Court stated:

The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.<sup>147</sup>

The Court recognized that suppression of speech could take many forms, be it licensing, permits, injunctions, or taxes.<sup>148</sup> Whatever the form, the First Amendment protects speech against governmental burdens.<sup>149</sup>

#### D. *Bantam Books, Inc. v. Sullivan*

The Court followed the *Thornhill* notion of a link between administrative licensing and subsequent punishment in *Bantam Books, Inc. v. Sullivan*.<sup>150</sup> In *Bantam Books*, the Rhode Island legislature created the “Rhode Island Commission to Encourage Morality in Youth” for the purpose of educating the public concerning “any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption” of the youth of Rhode Island.<sup>151</sup> The Commission sent no-

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<sup>141</sup> *Id.*

<sup>142</sup> *Grosjean, Sup’r of Pub. Accounts of LA v. Am. Press Co., Inc.*, 297 U.S. 233, 240 (1936).

<sup>144</sup> *Id.* at 251.

<sup>145</sup> *Id.* at 245-49.

<sup>146</sup> *Id.* at 249-50.

<sup>147</sup> *Id.* at 249-50 (citing to COOLEY’S CONSTITUTIONAL LIMITATIONS 886 (8<sup>th</sup> ed. year)).

<sup>148</sup> *Id.* at 249-50.

<sup>149</sup> *Id.* at 250.

<sup>150</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); see also Mayton, *supra* note 134, at 263-65.

<sup>151</sup> *Bantam Books*, 372 U.S. at 59.

tices to publishers, on official letterhead, declaring that their work “had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age.”<sup>152</sup> The Commission had no power to prosecute publishers, but their list of “inappropriate” material was recommended to the Attorney General for prosecution.<sup>153</sup>

Four publishers brought suit challenging the Rhode Island scheme as unconstitutional under the First Amendment.<sup>154</sup> They argued that although the Commission had no power to prosecute them for obscenity, the publishers unwillingly stopped distribution of the material rather than face possible court action.<sup>155</sup> The Court agreed with the publishers, holding that the Commission’s listing of objectionable material without a prior judicial determination of the classification of the speech was in fact an administrative prior restraint.<sup>156</sup> The Commission, regardless of its form, was in substance an informal censorship board inhibiting speech.<sup>157</sup>

Though the publishers were free to continue publishing the material without violating any law, the publishers did not act voluntarily when ceasing circulation of the material in question. The Commission, cloaked with the authority of the State, had coerced publishers into ceasing circulation. As the Court stated, “[p]eople do not lightly disregard public officers’ thinly veiled threats to institute criminal proceedings against them if they do not come around.”<sup>158</sup> The criminal process had been “superimposed” upon the Commission’s system, both “obviating the need to employ criminal sanctions,” and eliminating “the safeguards of the criminal process.”<sup>159</sup> The Commission’s threats in order to control speech were not intended to act as subsequent punishment, but rather operated as a prior restraint on speech.

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<sup>152</sup> *Id.* at 61.

<sup>153</sup> *Id.* at 62-64. The Attorney General conceded that several of the books picked out by the Commission were not obscene, and therefore not subject to criminal sanctions. *Id.*

<sup>154</sup> *Id.* at 61.

<sup>155</sup> *Id.* at 63.

<sup>156</sup> *Bantam Books*, 372 U.S. at 70.

What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned.  
*Id.*

<sup>157</sup> *See id.* at 67.

<sup>158</sup> *Id.* at 68.

<sup>159</sup> *Id.* at 69-70.

### III. THE FCC LICENSE REVOCATION SCHEME IS A PRIOR RESTRAINT UPON BROADCAST SPEECH

The portion of the FCC's indecency enforcement scheme authorizing the revocation of broadcast licenses is an unconstitutional prior restraint upon speech. Revoking licenses to enforce the decency standard does not fit within one of the exceptions to the prohibition against prior restraints.<sup>160</sup> Short of fitting within an exception, the "system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'"<sup>161</sup> The license revocation threat, like the systems found unconstitutional in *Thornhill* and *Bantam Books*, acts as an informal censorship board by chilling speech. The license revocation power forces broadcasters to censor themselves, keeping otherwise constitutional speech off the air, in order to avoid revocation proceedings. The revocation proceedings are a far greater threat to broadcasters than either fines or criminal prosecution because the broadcast license, the life itself of the broadcaster, is taken before any judicial proceeding to review the FCC's findings. Although ultimately a court may review the FCC's determination, the revocation itself constitutes a prior restraint because of the chilling effects such a threat has on broadcasters. Whereas all criminal statutes chill conduct to some extent, the revocation statute differs in that it does not proscribe with specificity what is criminal. Instead, the revocation statute puts the burden on the broadcaster to determine what may constitute an indecent broadcast deserving of revocation.

#### A. The Chilling Effects of License Revocation

License revocation chills speech by forcing broadcasters to censor themselves. The FCC has repeatedly warned broadcasters to "clean up" their material, or face the ultimate penalty for a broadcaster – license revocation.<sup>162</sup> Such warnings, as *Bantam Books* suggested, do not go unheeded by citizens and are especially followed by heavily regulated industries where every business transaction is monitored by the same agency that regulates the content of their broadcasts.<sup>163</sup> Although the Commission in *Bantam Books* threatened specific sellers, in this modern era of media consolidation the number of broadcasters is shrinking to the point that the threats are becoming more specific. For exam-

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<sup>160</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

<sup>161</sup> *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

<sup>162</sup> For examples of FCC threats to revoke licenses, see, e.g., *Indecency Policy Statement*, *supra* note 5, at 7999.

<sup>163</sup> See *Bantam Books*, 372 U.S. at 68-69.

ple, broadcasters do not just answer to the FCC for decency regulations; the FCC renews licenses, approves license transfers, and promulgates the rules that govern how the industry operates.<sup>164</sup> Therefore, because the FCC is imbued with so much power over every aspect of the broadcaster's operation, the broadcaster must take the FCC's warnings seriously. When those warnings rise to the level of threats over the very existence of the broadcaster, the broadcaster is certain to take every precaution to avoid this "execution."

The way that broadcasters avoid revocation proceedings is by self-censoring the material that they air. Two recent events serve as examples of the self-censorship that the threat of license revocation causes and that the Court in the past has thwarted. There is a current push among some broadcasters to reinstate a voluntary code of conduct that broadcasters abandoned several years ago.<sup>165</sup> Under the code, broadcasters would voluntarily attempt to curb indecent broadcasts.<sup>166</sup> This is clearly an example of self-censorship, and therefore a prior restraint, in the form of a voluntary association of all broadcasters. Whatever self-censorship fears the Court may have had in *Thornhill* and *Bantam Books*, it is certainly at the most extreme level when all broadcasters agree among themselves to censor their own speech. If all broadcasters agree to censor themselves, there remains no broadcast outlet for constitutionally protected, though possibly indecent speech. Although such action is private, and thus not deserving of First Amendment protection, the fact remains that the government has forced private persons to censor their airwaves, thus limiting ideas that are able to reach the public.

In addition to the possible reinstatement of the code, recent threats by the FCC to revoke licenses have driven some broadcasters to take action to remove all material that may or may not be indecent from their broadcast programming.<sup>167</sup> Clear Channel Communications, the nation's largest radio broadcaster

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<sup>164</sup> See 47 U.S.C. §303.

<sup>165</sup> Written Statement of Kevin J. Martin, Comm'r, Federal Communications Comm'n, on *Protecting Children from Violent and Indecent Programming*, Before the Comm. on Commerce, Science, and Transportation, United States Senate, at <http://www.parents-tv.org/ptc/publications/release/2004/senatehearingKM.asp> (Feb. 11, 2004) (proposing that the FCC put out for comment the Paxson Network suggestion that the Public Interest Code of Conduct be reinstated).

<sup>166</sup> *Id.*

<sup>167</sup> Press Release, Clear Channel, Inc., Clear Channel Imposes Strict New Standards for Broadcast Decency, at [http://www.transportationmedia.com/documents/press\\_releases/20-04\\_02\\_25\\_CC\\_Decency\\_Initiative.pdf](http://www.transportationmedia.com/documents/press_releases/20-04_02_25_CC_Decency_Initiative.pdf) (Feb. 25, 2004). Clear Channel is imposing a zero tolerance policy, and will institute internal investigations if the FCC accuses a DJ of indecency. *Id.* The company will terminate any DJ found by either the company or the FCC to be indecent. *Id.* The statement also calls for a "Decency Task Force" composed of members of the broadcast industry to end indecency in the media. *Id.*

has pulled several programs from its stations. Two such programs, Howard Stern and Bubba the Love Sponge, have been the poster boys for indecency. Clear Channel was faced with an indecency complaint for Bubba the Love Sponge.<sup>168</sup> Before the FCC made a determination, Clear Channel removed Howard Stern from six markets, seemingly to appease the FCC and act as an example of its commitment to clean up its own programming.<sup>169</sup>

Self-censorship is not completely unique to the threat of license revocation; the forfeiture penalties that are available to the FCC to enforce the decency standard also contribute to self-censorship, though to a lesser extent. License revocation is particularly severe because it is the most extreme punishment that may be imposed upon a broadcaster. Without a license, a broadcaster is forced off the airwaves and out of business. A broadcaster without a license is unable to recoup the costs of operating, including the cost of the original license. All speech under that license is suppressed, and the fact that the broadcaster had its license revoked for broadcasting indecent material will be considered if the broadcaster ever tries to obtain another license.<sup>170</sup>

License revocation is also different from a fine because revocation acts like an injunction. If the FCC imposes a fine, a broadcaster may pay it and presumably learn its lesson. But with an injunction, no more speech may be made under that license. In fact, license revocation is even more offensive to the First Amendment than an injunction because, after the license is revoked, the broadcaster cannot violate the revocation and continue speaking, as an enjoined broadcaster could. While a publisher can violate an injunction that it feels is unlawful, the broadcaster that has had his license revoked has essentially been executed. He can make no speech, and probably lacks the funds to enter into a costly legal battle, especially in light of the fact that he no longer has a business creating revenue. Thus, revocation operates as a permanent injunction.<sup>171</sup>

The Court's most recent decision discussing the line between subsequent punishments and prior restraints emphasized that subsequent punishments allow the speaker to continue making other speech, as distinguished from prior restraints that enjoin speech permanently.<sup>172</sup> This makes the difference between a fine and revocation clear; the broadcaster without a license is perma-

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<sup>168</sup> *In re Clear Channel Broadcasting Licenses, Inc., Notice of Apparent Liability*, 19 FCC Rcd. 1768 (2004).

<sup>169</sup> *See Clear Channel Pulls Stern Off Stations*, USATODAY.COM, at <http://www.usatoday.com/life/music/news/2004-02-25-stern-usat-copy-xhtm> (Feb. 25, 2004).

<sup>170</sup> *See* 47 C.F.R. §13.13 (1998).

<sup>171</sup> *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (failing to find a prior restraint from confiscation).

<sup>172</sup> *Id.* at 550-51.

nently enjoined from future speech via broadcast.

What most offends the First Amendment is the fact that constitutionally protected speech is being suppressed. Though indecent material may lie at the “periphery” of the First Amendment, it is protected speech nonetheless.<sup>173</sup> While other speakers, such as publishers, self-censor some speech in order to keep away from the “obscenity line,” the broadcaster must self-censor speech in order to keep away from the “indecent line,” which includes much more protected speech. As a result, many things that may have social or artistic value are kept off the airwaves and do not contribute to the marketplace of ideas.<sup>174</sup>

#### B. The Justifications for Indecency Regulation are no Longer Valid

In *Pacifica*, the Court relied upon two justifications in upholding the FCC’s indecency regulations: (1) the need to protect privacy within the home from the intrusive nature of broadcast and (2) to protect children due to the uniquely accessible nature of broadcast.<sup>175</sup> The current state of broadcast is radically different than it was when *Pacifica* was decided in 1978. Changes in broadcasting, such as cable and filtering technology, have altered the media landscape so much that the Court should review its prior reasoning.

At the time *Pacifica* was decided, as implicitly recognized by the Court, almost all homes received television and radio signals in the broadcast form via the airwaves. The argument that the FCC should be able to regulate indecency because broadcast invades the home is no longer viable because the vast majority of Americans have cable television,<sup>176</sup> a medium that is subject to far less regulation than broadcast.<sup>177</sup> Cable is not an “invader” of the home; it is a welcome, subscribed-to guest in a majority of homes in America. It no longer makes sense to regulate broadcast more strictly because most people now receive their broadcast networks over the same coaxial cable that brings HBO, Cinemax, and Showtime into the home. Because signals are no longer invad-

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<sup>173</sup> FCC v. *Pacifica Found.*, 438 U.S. 726, 743 (1978).

<sup>174</sup> For example, several ABC network affiliates decided not to air the movie *Saving Private Ryan* on Veteran’s Day for fear that its explicit language and graphic violence may subject them to FCC punishment. See *ABC Affiliates Pulling ‘Private Ryan,’* CNN.COM, at [http://money.cnn.com/2004/11/11/news/fortune500/savingpvt\\_ryan/index.htm?cnn=yes](http://money.cnn.com/2004/11/11/news/fortune500/savingpvt_ryan/index.htm?cnn=yes) (Nov. 11, 2004).

<sup>175</sup> *Pacifica*, 438 U.S. at 748-49.

<sup>176</sup> There are 108,410,160 U.S. television households, and there are 73,365,880 basic cable customers, making the cable penetration percentage for U.S. television households 67.7%. See *Association 2003 Year-End Industry Overview*, NATIONAL CABLE & TELECOMM., Dec. 2003, at 20.

<sup>177</sup> See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

ing homes, the FCC should no longer be permitted to regulate indecent material that is protected under the First Amendment. Although broadcast licensees must serve the public interest, as opposed to privately owned cable providers, the end product of delivery into the home is the same, and perhaps a rethinking of the entire regulatory scheme is required. In any event, the proliferation of cable technology has erased the fiction that broadcasting is an unwelcome intruder into the home.

Moreover, the way in which radio is transmitted has changed and is continuing to change. Satellite and subscription radio services have grown rapidly in popularity, although these services have not yet attained the same status as cable television.<sup>178</sup> Notwithstanding, regulation of indecency in radio broadcasts should also be revisited. In fact, the survival of broadcast radio itself may depend upon it. As the FCC cracks down on broadcasters for indecency, more listeners have begun to subscribe to satellite radio in order to receive the content that they desire. Indecency regulation, therefore, has put the existence of traditional radio in jeopardy.

Furthermore, the Court's second rationale in *Pacifica*, protection of children, is no longer viable. Additional changes in technology now make it possible for children to be protected against questionable material without government intervention. For example, the V-chip, named because of its original purpose to filter violence, allows parents to program their televisions to filter out material that they feel is not suitable for their children.<sup>179</sup> Parents program the chip to block television programs that have a rating higher than what the parent deems suitable for their children.<sup>180</sup> In addition, all new televisions have this filtering technology, and it is the parent's responsibility to turn on the chip.<sup>181</sup> Any parent who wants to screen out questionable material may do so without the need of government regulation of indecent programming.

#### IV. PROPOSALS FOR CHANGE

Because of the recent emergence of indecency as a politically charged issue, Congress is considering following the FCC's suggestions that the punishments for airing indecent material be increased. The recent legislation, "The Broad-

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<sup>178</sup> See *Satellite Radio Gains Subscribers*, GRAMMY.COM, at <http://www.grammy.com/news/newswatch/2004/1228.aspx> (Dec. 28, 2003).

<sup>179</sup> See *In re* Technical Requirements to Enable Blocking of Video Programming based on Program Ratings Implementation of Sections 551(c), (d), and (e) of the Telecommunications Act of 1996, 13 FCC Rcd. 11248 (1998).

<sup>180</sup> *Id.*

<sup>181</sup> See FEDERAL COMMUNICATIONS COMMISSION, V-CHIP: VIEWING TELEVISION RESPONSIBLY, at <http://www.fcc.gov/vchip> (last visited Apr. 25, 2005).

cast Decency Enforcement Act of 2004,” began as an attempt to increase the forfeiture penalties from \$27,500 to \$275,000 for each indecent utterance, with a cap of \$3,000,000 for any single act by a broadcaster.<sup>182</sup>

Also there have been several amendments to the legislation that have increased the penalties available to the FCC in enforcing decent programming. One such proposed amendment increases the penalty from the original ten-fold increase (\$275,000) to \$500,000 for each violation.<sup>183</sup> Though in theory a fine is less likely to violate the First Amendment, when fines become exceptionally large they too begin to resemble prior restraints. If the fine available is \$500,000 for each indecent utterance, it is not outside of the realm of possibility to see fines totaling several million dollars.<sup>184</sup> Such high fines would, in effect, act as a license revocation because a broadcaster would have to self-censor or face a possible fine that would put some broadcasters out of business, or as is more likely, would force network executives to be even more vigilant censors of their airwaves. This negative effect of fines may be stopped if there is some reasonable maximum cap on the fines themselves.

There are several forfeiture approaches that would protect against this potential chilling effect. One such way would be to set the amount of the penalty as a percentage of the broadcaster’s revenue from that indecent broadcast. If a station has one morning program that is indecent, then a percentage of that specific indecent program’s advertising revenue would be forfeited. By using a percentage of advertising revenue as the determining factor, the scheme would not unfairly punish smaller broadcasters while still allowing larger media companies to figure fines as a cost of doing business. On the other hand, this would still relate the amount of the fine back to the actual indecent utterance as opposed to a seemingly arbitrary statutory amount.

Another provision of the amendment to the Decency Act includes a “3 strikes” provision that would allow a license to be revoked for three violations of the indecency rule.<sup>185</sup> This provision has less chilling effects than straight license revocation because a broadcaster is given the opportunity to “feel out” where the indecency line lies. But this provision still threatens revocation. Because of the delay involved in the FCC’s procedures, it is likely that a broadcaster would accrue three violations before ever having a determination on the original indecent utterance. A broadcaster would run the risk of being

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<sup>182</sup> Broadcast Decency Enforcement Act of 2004, H.R. 3717, 108th Cong. (2004); Broadcast Decency Enforcement Act of 2004, S. 2056, 108th Cong. (2004).

<sup>183</sup> Broadcast Decency Enforcement Act of 2004, H.R. 3717, §2, 108th Cong. (2004).

<sup>184</sup> Under the current regime of \$27,500 for each violation, the FCC has handed out fines totaling over \$1 million. If the fine for each violation increases to \$500,000, the total for the same broadcaster would have increased to over \$200,000,000.

<sup>185</sup> Broadcast Decency Enforcement Act of 2004, H.R. 3717, §9, 108th Cong. (2004).



ousted from the airwaves before ever fully adjudicating the issue of indecency. Because of these delays in FCC hearings, this provision would also constitute a prior restraint.

A final provision allows the FCC to consider indecency violations during the broadcaster's subsequent license renewal hearings.<sup>186</sup> This provision seems less offensive to the First Amendment because at the renewal hearing the broadcaster could present mitigating factors, and the fact that there was an indecent utterance is not absolutely dispositive of whether or not the broadcaster keeps his license.

## CONCLUSION

Depending upon one's opinion, recent broadcasts, such as the Super Bowl halftime show, Bubba the Love Sponge, and the Howard Stern show, may represent a decline in "decent" broadcasting.<sup>187</sup> However, as long as the Court's decision in *Pacifica* remains law, the FCC is allowed to regulate decency on the air.<sup>188</sup> The issue then becomes how the Commission can enforce decency. The argument for increased penalties seems attractive because the forfeiture penalties have not been increased in a number of years, meanwhile the number of indecency complaints has been on the rise.<sup>189</sup> Regardless, the FCC should not revoke a license in order to enforce decency.

Under the decisions in *Thornhill* and *Bantam Books*, the "informal censorship" that results from the threat of license revocation chills speech such that license revocation becomes a prior restraint upon speech. The threat of license revocation forces broadcasters to censor their own speech and has in effect super-imposed a censorship board onto a system of administrative sanctions. The First Amendment tolerates punishments after speech is made, but it does not permit the government to wield such heavily coercive penalties over broadcasters.

A more appropriate enforcement mechanism would be an updated fine, coupled with a revised system of license renewal hearings. Fines should be increased with the passage of time in order to maintain their deterrent effect. Overly high fines, such as the proposed \$500,000 for each utterance, are just

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<sup>186</sup> *Id.* § 8.

<sup>187</sup> This paper is not intended to support or refute the idea that indecency has gone too far.

<sup>188</sup> As discussed *supra*, Part III.B., the justifications for regulation presented in *Pacifica* may no longer be viable, and the case may need to be overruled.

<sup>189</sup> See [http://truthout.org/docs\\_04/printer\\_120804J.shtml.com](http://truthout.org/docs_04/printer_120804J.shtml.com) (last visited 05/18/05). In 2003, the FCC received over 240,000 complaints compared with 14,000 in 2002, and less than 350 in both 2000 and 2001. *Id.*

license revocations in another form for some broadcasters and a cost of doing business for others. Should Congress choose to increase the fines to such a level, there should be a cap, such as the \$3 million cap in the legislation, so that the fines do not infringe the First Amendment. As stated earlier, smaller broadcasters could be put out of business by large fines. Instead, a better alternative would be a fine based upon a percentage of revenue that would level the field for broadcasters of all sizes, thus making sure that the penalty is not a death sentence for some and a mere cost of doing business for others. By revising the license renewal system so that indecency is considered, broadcasters would no longer expect an automatic renewal, and would have an incentive to be decent on air. These penalties, as opposed to revocation, allow the FCC to regulate indecency without acting in an overly coercive manner. The choice to air decent material should belong to the broadcaster (who will be responsible in fines later), and should not be dictated by the FCC. License revocation represents the FCC's ability to make decisions for the broadcaster. Surely the First Amendment does not allow it to do as much.